

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Implementation of
Video Description of
Video Programming

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MM Docket No. 92-239

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**REPLY COMMENTS OF THE
NATIONAL CABLE TELEVISION ASSOCIATION**

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**Before the
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In the Matter of)	
)	MM Docket No. 99-339
Implementation of)	
Video Description of)	
Video Programming)	

**REPLY COMMENTS OF THE
NATIONAL CABLE TELEVISION ASSOCIATION**

The National Cable Television Association ("NCTA"), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

NCTA's initial Comments urged the FCC not to adopt its proposal to require video description. NCTA's Comments showed that the FCC lacks authority to adopt rules. Our Comments also demonstrated that most cable networks are not currently able to provide video description. And cable operators do not currently have the equipment necessary to transmit video description to their customers on all the cable channels potentially subject to the requirement.

Many other commenters -- including program producers, broadcasters and other multichannel video programming distributors -- expressed similar concerns about a video description requirement. And one of the major advocacy groups for the visually impaired -- the National Federation of the Blind -- opposed any FCC mandate for video description.

Proponents of video description, including other organizations representing people with visual impairments and providers of the video description service, urged an even more aggressive timetable for imposition of rules and even more extensive obligations than those suggested in the Notice. We support the Commission's goal of making video programming

more accessible to people with disabilities. But that does not justify an FCC mandate for video description. Its supporters fail to make the legal case that the FCC has authority to adopt rules, and cannot show that the significant technical and practical obstacles to a FCC rule can be overcome.

ARGUMENT

I. THE FCC LACKS AUTHORITY TO IMPOSE VIDEO DESCRIPTION

NCTA's initial comments demonstrated that Congress withheld authority from the Commission to mandate the provision of video description, deliberately removing rulemaking power that had been authorized in a version of the legislation that was not signed into law.¹ Several commenters agree that the absence of statutory rulemaking authority is confirmed by an examination of the language, legislative history, and structure of Section 713 of the 1996 Act.²

Some video description supporters nonetheless claim that the Commission has ample authority to forge ahead. For example, the Comments of WGBH assert that the Commission has "broad powers" to act in this area,³ and argue that "the failure of Congress to mandate video description by a date certain, as it did with closed captioning, does not remove the Commission's authority to adopt video description pursuant to a standard rulemaking proceeding."⁴ But that unbounded view of FCC authority is not supported by well-established rules of statutory construction. NAB's comments point out that, "as the Supreme Court has specifically recognized, the deletion of a provision from a bill in conference committee 'strongly militates

¹ NCTA Comments at 4 - 5.

² See, e.g., Comments of the Motion Picture Association of America at 3 - 4 (hereinafter "MPAA Comments"); Comments of the National Association of Broadcasters at 2 - 7 (hereinafter "NAB Comments").

³ Attachment to Comments of WGBH at 1.

⁴ Id. at 2.

against a judgment that Congress intended a result that it expressly declined to enact.”⁵ The Commission itself recently acknowledged the limits on its ability to impose regulations in these circumstances.⁶

WGBH argues that when Congress deleted the FCC’s rulemaking authority, it simply gave the Commission the power to adopt rules “without setting a date certain for adoption of regulations.”⁷ That theory, however, has no basis in the statute or its legislative history. Congress required the FCC to adopt closed captioning rules within 18 months after the law’s enactment. But even the House language that permitted, but did not require, the FCC to adopt video description rules,⁸ was rejected in conference. That permissive House language imposed no timeframe for any FCC action.

The Comments of the National Television Video Access Coalition (“NTVAC”) allege that Commission precedent under Section 255 of the Telecommunications Act, a provision governing telecommunications equipment and services, not video programming, “decisively resolves any doubts which may have persisted as to the Commission’s authority to regulate.”⁹ NTVAC claims that the FCC, in circumstances allegedly similar to those found in Section 713, determined that it had jurisdiction to adopt rules under Section 255, even though language

⁵ NAB Comments at 5 (quoting Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 299 (1974)).

⁶ Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, CS Docket No. 99-363 (rel. Mar. 16, 2000) at ¶14 (“where Congress expressly considers and rejects . . . an approach, the rules of statutory construction do not favor interpreting a subsequent statutory provision to require the rejected alternative.”) (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987)).

⁷ Attachment to WGBH Comments at 2.

⁸ Section 204 of the House bill provided that after completing its inquiry into video description, “the Commission may adopt regulation it deems necessary to promote the accessibility of video programming to persons with visual impairments.” H.R. Rep. No. 104-204, 104th Cong. 1st Sess. (1995). (emphasis supplied.)

⁹ NTVAC Comments at 20.

specifically granting the FCC that power was not included in the bill that became law. But numerous differences between Section 255 and Section 713 compel a different conclusion here.

First, the mandates of Section 255 and Section 713 differ. Section 255 dictates that “a manufacturer of telecommunications equipment ... shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable”¹⁰ and that a “provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.”¹¹ In contrast, the language of Section 713, read in context, does not “charge” the Commission “to ensure” that video programming is accessible through video description, as NTVAC claims;¹² it simply asks the Commission to examine the voluntary use of video description, and report back to Congress on the results of its examination.¹³ The language of the statute – rather than the snippets quoted by NTVAC – does not evidence a mandate to impose video description at all.

NTVAC also points to Section 713(h), which bars private rights of action “to enforce any requirement of this section or any regulation thereunder.”¹⁴ It claims that this language, too, “gives [the Commission] the authority to adopt regulations.”¹⁵ But the fact that Congress mentioned “regulations” in this subsection hardly provides an independent basis on which to proceed. It demonstrates nothing about the FCC’s rulemaking power with respect to video

¹⁰ 47 U.S.C. §255(b).

¹¹ Id., Sec. 255(c).

¹² NTVAC Comments at 21.

¹³ Section 713 directs the Commission to “commence an inquiry to examine the use of video description on video programming in order to ensure the accessibility of video programming to persons with visual impairments, and report to Congress on its findings.”

¹⁴ NTVAC at 21 (quoting 47 U.S.C. Sec 713(h).)

¹⁵ Id. at 21.

description – because the regulations to which subsection (h) undoubtedly refers deal with closed captioning, which also was addressed in Section 713.

Video description supporters also urge that, regardless of what Congress said or did with respect to video description in Section 713, the FCC has other broad powers to act. For example, WGBH asserts that the Commission has “broad jurisdiction,” which it claims includes “any matter ‘reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.’”¹⁶ NTVAC’s Comments similarly claim that the Commission has authority to adopt video description rules applicable to cable television under “the jurisdiction under the rubric of United States v. Southwestern Cable Co., 392 U.S. 157 (1968).”¹⁷

NCTA’s Comments demonstrated the flaws in this analysis. Section 624(f), adopted in the 1984 Act, establishes that the FCC “may not impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI of the Act.]” Absent express authority to mandate the provision of video description in Section 713 or elsewhere, the FCC lacks any other authority to adopt rules, like those contemplated here, that would govern the “provision or content” of cable services.¹⁸ Thus, Section 624(f) makes clear that after the 1984 Cable Act, no “ancillary to broadcasting jurisdiction” could justify the Commission’s regulation of cable television content or services. Any effort to impose video description rules on cable on that basis, therefore, is unavailing.

Finally, assuming, arguendo, that the FCC’s power to proceed to adopt rules is at all ambiguous, other legal principles warrant caution here. The constitutional implications of

¹⁶ WGBH Attachment at 1.

¹⁷ NTVAC Comments at 19.

¹⁸ NCTA Comments at 6 - 7.

mandating video description compel a narrow interpretation of the Commission's authority.¹⁹

II. VIDEO DESCRIPTION SUPPORTERS UNDERSTATE THE NATURE OF THE OPERATIONAL AND TECHNICAL BARRIERS TO INTRODUCING THE SERVICE

The provision of video programming more accessible to persons with disabilities is a worthy goal. But even if the FCC were to have some discretion in this area, NCTA's Comments, as well as the comments of representatives of the entities that would be involved in providing programs with video description, contain a number of compelling reasons why the FCC should refrain from mandating video description. The complexity, both from a production and distribution standpoint, caused by a government requirement to provide any amount of video description is a further reason for the Commission to permit voluntary efforts to proceed – efforts that can better take these considerations into account than any government rule.

Our Comments showed that most cable networks would need to modify their entire distribution chain to provide a third channel of audio in which video descriptions would be offered.²⁰ And cable operators would also be forced to acquire additional equipment to supply customers with the secondary audio program ("SAP") for each cable channel carrying video descriptions. The cable industry is not alone in facing these difficulties. For example, the NAB

¹⁹ NCTA Comments at 6-7; NAB Comments at 10-13; MPAA Comments at 6-14; A&E Comments at 12-14. Indeed, as C-SPAN's Comments demonstrate, "[i]n light of the journalistic nature of the speech of the C-SPAN Networks' government affairs coverage, the small benefit that video description is likely to add to that speech, and the inherent nature of the description expected by the government, it is difficult to see how the compelled speech of a video description requirement could pass constitutional muster." C-SPAN Comments at 6.

²⁰ A&E Television Networks points out that "the current playbacks for A&E Television and The History Channel do not support the signal routing of the additional audio, but will only support the routing of stereo sound. Multiple mandatory audio tracks would affect adversely AETN's digital compression system." A&E Comments at 19.

explained that the origination centers and distribution systems of the over-the-air networks were not designed to support three channels of audio.²¹

Video description supporters either attempt to minimize or ignore these concerns. WGBH, for example, baldly asserts that “the barriers to start-up of a four-hour per week described programming schedule are slight, both on the distributors’ technical infrastructure side as well as on the description provider side.”²² They argue that any mandate should be implemented long before any switchover from analog to digital transmission occurs – in fact, sooner than the exceedingly aggressive 18-month post-rule schedule proposed in the NPRM.²³ And they propose that the Commission go beyond the steps that it announced in the Notice to extend the rules to all distributors and to a sizable group of cable program networks for all prime-time programming as soon as possible.²⁴ But, as explained below, the barriers to proceeding to mandated video description are not “slight,” but significant.

A. Including Video Description in Cable Programming Would be Costly

In its Comments, NCTA submitted cost data that shows that providing video description would be a costly undertaking, both for program networks and their distributors. Estimates range between several hundred thousand dollars to millions of dollars per network, simply to enable a program network to provide the proposed amount of video description each week.²⁵ Cable

²¹ NAB Comments at 15 - 17.

²² WGBH Comments at 16. Its own comments, though, implicitly recognize that technical and logistical issues persist in today’s analog world. *Id.* at 8 (acknowledging certain issues in analog transmission of third audio channel.)

²³ *Id.* at 6 (proposing start date of 12 months after the effective date of the rules).

²⁴ WGBH, for example, proposes an even more expansive rule in its Comments than it originally suggested in its proposal to the FCC that formed the basis for the NPRM. For example, it urges that the Commission include premium cable networks as well as “nonbroadcast networks reaching at least 50% of their targeted market (in the case of basic cable networks, 33 million of approximately 67 million total subscribers).” WGBH Comments at 12. See discussion, *infra*.

²⁵ NCTA Comments at 15.

operators would be forced to incur additional costs to provide their customers with a SAP channel for each of the 50 cable networks identified by WGBH as potentially desirable to cover.²⁶ As our comments described, those costs could approach \$20 million nationwide for each cable network for which SAP capability would be required.²⁷

In addition to playing down these costs, supporters of video description take a similar approach with respect to the costs of describing the programming itself – costs which WGBH acknowledges to be \$4000 per hour.²⁸ They argue that “the cost of description could be readily absorbed into the framework of ballooning production budgets with little impact on broadcasters or the production and post-production studios.”²⁹ The Comments of several cable program networks in this proceeding demonstrate the fallacy of these assumptions.

For example, the Comments of C-SPAN explain that “[a]s of the last fiscal year it cost the C-SPAN Networks between \$1,300 and \$1,400 to produce each hour of first run public affairs programming. Even if the cost to describe our programming were but a small fraction of the several thousand dollars per hour cited in the Notice, it could easily take up half our current programming budget.”³⁰ The Comments of the International Channel note that, in addition to the significant technical issues video description would cause it to face, “[a]lthough it would be difficult to estimate precisely the cost of video description for the programming on the International Channel because such descriptions simply are not feasible or available, ICCP believes that the cost of video descriptions would substantially exceed its programming

²⁶ Id. at 15-16.

²⁷ NCTA Comments at 16-17.

²⁸ WGBH Comments at 13-14. The Narrative Television Network states that its current price is “below \$2000 per completed hours of accessible programming.” Narrative Television Network Comments at 3.

²⁹ Comments of the American Foundation for the Blind at 6; NTVAC Comments at 12 (“These costs constitute only a tiny fraction of the total production budget.”)

³⁰ C-SPAN Comments at 10.

budget.”³¹ The Game Show Network’s Comments similarly explain that the costs of describing a program “[c]an be as much as 20% of the cost of an original [Game Show Network] program.”³² And A&E’s Comments show that “the four major broadcast networks, for example, spend more on prime time programming in two weeks than does a cable network the size of A&E Television or The History Channel in the course of a year. Moreover, such costs are covered by much greater revenues, because of the differences in ratings and advertising rates. Accordingly, the economic effect of video description requirements would be very different for a cable network than for a broadcast network.”³³ In short, the assumption that these costs are insignificant is belied by the record.

B. Video Description Could Conflict with Other Uses of the SAP

Cost considerations aside, because there is only a single SAP channel in the analog world, a video description requirement would inevitably conflict with other current or planned uses by those programmers that have a third audio channel. As just one example, C-SPAN explains that:

the signal containing the C-SPAN programming service includes two audio subcarriers (in addition to the one for C-SPAN itself) that contain two valuable audio programming services. One is devoted to our round-the-clock carriage of the BBC’s World Service, an international English-language news and cultural programming service. The other is devoted to our just as extensive carriage of the World Radio Network, an audio service containing the English-language news services of several countries around the world. Currently, there is not enough bandwidth to accommodate the addition of video description on C-SPAN without eliminating one or both of the existing audio services.³⁴

Several other cable networks – including premium networks, like HBO, Showtime and Encore identified by some commenters as program services that should be covered by any video

³¹ ICCP Comments at 5-6.

³² Game Show Network Comments at 5.

³³ A&E Comments at 19.

³⁴ C-SPAN Comments at 9 (emphasis supplied).

description obligation³⁵ – make significant uses of their third audio channel to provide Spanish language audio.³⁶ Yet others use a third audio track to provide local weather information or to transmit “cue tones” for local advertising insertion or to signal program blackouts.³⁷

The solutions to this SAP-channel conflict offered up by some video description advocates would even further burden programmers’ exercise of editorial judgement about the needs and interests of their audience. Some advocates, for example, urge that the FCC require networks that air programming with other uses of the SAP (such as Spanish language) to repeat that program at some other time with video description on the SAP.³⁸ Requiring program networks to repeat their program offerings is no solution to this problem.

NCTA’s initial comments explained that Spanish language audio was often aired during prime time – the same time during which video description would be required. A mandate to rerun Spanish language programming during some other day part – or run the same program again during prime time containing video description – would compound the government’s inappropriate involvement in a programmer’s use of one of its audio channels by interfering with a programmer’s decisions about what to air, and when.³⁹ At the same time, it would introduce significant elements of confusion for audiences who expected to hear Spanish language or some

³⁵ See, e.g., WGBH Comments at 14.

³⁶ Approximately 85 percent of programming on Showtime and The Movie Channel contains a separate Spanish language audio track. Approximately 85 percent of HBO’s program schedule (and approximately 93 percent of HBO’s prime time programming) includes Spanish language on the SAP. And Encore includes Spanish language audio on 50 percent of its programming.

³⁷ NCTA Comments at 12-13.

³⁸ See WGBH Comments at 18; NTVAC Comments at 4 (Prior to the conversion to digital, “we are confident that matters can be worked out. Channels could air certain programs twice, once with descriptions, once with Spanish translations.”)

³⁹ The Comments of the National Federation of the Blind suggest that “the vast majority of Spanish-speaking blind people would much prefer to have the SAP channel used to translate English-language dialogue into Spanish rather than to have it used for English-language description of sets, costumes, and the like.” National Federation of the Blind Comments at 5.

other audio when they turn on their SAP. And it would impose considerable burdens on programmers serving the Spanish-speaking audiences. Networks would be forced to redub tapes to accommodate video description. They would also be required to essentially double the volume of effort needed to put on a particular program, severely taxing the network infrastructure and perhaps requiring the hiring of additional support resources.

In short, as the Commission previously recognized,⁴⁰ competing uses of the SAP would be curtailed or displaced if video description were required.

III. CABLE PROGRAM NETWORKS PROVIDE A WIDE RANGE OF PROGRAMMING FOR WHICH VIDEO DESCRIPTION IS UNSUITABLE OR IMPRACTICAL

In addition to these documented costs and technical difficulties, the lack of support for video description, even among the intended beneficiaries of the rule, is a further reason why video description should remain a voluntary undertaking. The Comments of the National Federation of the Blind (“NFB”), the largest advocacy group for the blind, “oppose the imposition of audio description as a federal mandate.”⁴¹ NFB explains that “our members are well aware of the fact that – when done right – audio description can add to the entertainment value of certain movies and television programs. However, that does not justify a federal mandate for its use.”⁴² Indeed, according to NFB, “some [blind people] like the service of ‘descriptive video’; some dislike it; many are frankly indifferent.”⁴³ Their Comments explain that “[m]any blind people don’t use the current service because they find it irritating, overdone, and full of irrelevant information. Many of us have experimented with secondary audio only to

⁴⁰ Closed Captioning and Video Description of Video Programming, 11 FCC Rcd. 19214, 19264-5 (1996).

⁴¹ Comments of the National Federation of the Blind at 1.

⁴² Id. at 2(emphasis supplied.) NFB instead urges the Commission to focus on access to local news, weather, sports and health-related information on commercials. But other commenters disputed the need for this information, stating that emergency “information is readily available on radio.” Alan Clive Comments at 4.

turn it off in relief and watch the program with our other senses in peace. While the use of SAP is obviously voluntary, this reaction raises questions . . . as to whether that voluntary use by blind people should be linked to mandatory production by networks.”⁴⁴

Even supporters of video description do not agree on which types of programming should be covered. WGBH proposes to cover “those nonbroadcast networks, reaching at least 50% of their targeted market (in the case of cable networks, 33 million of approximately 67 million total subscribers.)” And it also suggests that “it would be appropriate to apply video descriptions to at least [certain identified] pay cable networks based on their relative position in the effected market,” even though they do not reach 50 percent of MVPD households.⁴⁵ But, in addition to issues raised by the current use of the SAP by these services described above, premium networks reach a much smaller subset of the general public than do over-the-air broadcast networks.

While urging the Commission to broadly sweep cable networks within the rules’ coverage, even WGBH acknowledges that different groups may have different preferences for which cable networks should contain video description. It suggests that “consumer choice and opinions should be heeded when determining channels by content type,”⁴⁶ and admits that video description is not needed for the many live, primarily aural cable networks.⁴⁷ For example, it acknowledges that “popular cable news and sports channels (e.g., CNN, CNBC, CSPAN, ESPN,

⁴³ NFB Comments at 2.

⁴⁴ Id.

⁴⁵ WGBH Comments at 14.

⁴⁶ Id. at 14.

⁴⁷ Id.

MSNBC, and others),” as well as home shopping channels, are not high priorities for video description.⁴⁸

Other proponents suggest a different approach. The American Foundation for the Blind, for example, proposes that “each network should be required to ensure description of the top 20 percent of its series programs, including dramas and comedies and children’s programs with an additional 20 percent of programming brought into compliance over a total of five years.”⁴⁹ Other comments suggest that only new programming, and not repeat or syndicated programming, should count toward the four hours weekly requirement.⁵⁰

None of these commenters explains how any of these rules should or could be applied in the cable television context. Yet, many of the cable networks potentially subject to the rules do not typically air entertainment series programming during prime time,⁵¹ or do not rely primarily on original programming.⁵²

The difficulty in crafting a mandate for video description is obvious, and only serves to highlight the need for the government to refrain from imposing any rules.

⁴⁸ Id. See also NTVAC Comments at 4 (sports and news are “a low priority for described programming. This is so because news programs leave no space to insert descriptions, and many sports programs are simultaneously carried on radio, where descriptives are inherently in the commentary. It is for this reason that the Coalition has suggested that live news and sports should be exempted from any video description requirement.”)

⁴⁹ Comments of the American Foundation for the Blind at 7.

⁵⁰ WGBH Comments at 14-15; NTVAC Comments at 11; Narrative Television Network Comments at 4.

⁵¹ For example, NCTA’s initial Comments explained that much of the programming aired by cable networks during prime time is live or tape-delayed versions of live events or music programming – programming for which video description is inherently unsuitable. NCTA Comments at 18-19.

⁵² NCTA’s Comments explained that many cable networks rely on preexisting syndicated movies and services for which they are not copyright owners. NCTA Comments at 18-19. See also MPAA Comments at 14 (under federal copyright law, “the making of a video description can only be undertaken by or with the consent of the producer.”)

IV. IF THE FCC ADOPTS RULES, IT SHOULD TAKE INTO ACCOUNT THE NUMBER OF CUSTOMERS SERVED BY EACH CABLE SYSTEM IN ADDITION TO THE AGGREGATE NUMBER OF CUSTOMERS SERVED BY AN MSO

Several commenters urge the Commission to sweep within its rules all cable operators with more than a certain number of cable subscribers nationwide.⁵³ Should the Commission adopt rules, subjecting a cable operator to video description obligations based on its aggregate customer base nationwide surely does not provide “equivalency” to the four network affiliates in the top markets in the nation. A large multiple system operator (“MSO”) could have systems around the country that significantly differ in size – ranging from more than a hundred thousand customers to merely a few hundred customers. Thus, any cut-off for cable operators must focus on the system size in addition to the number of aggregate subscribers served by an MSO.

Should the FCC impose video description rules on “larger MVPDs,” all MVPDs should be treated the same for these purposes. Thus, the Commission should not fall for DirecTV’s transparent attempt to escape from these obligations by claiming that it is not “dominant” in local markets.⁵⁴ DirecTV has more than 8 million subscribers, and EchoStar has over 3.5 million customers. That would place them at the same subscribership level as the third and seventh largest MSO, respectively. Cable operators must install equipment locally on every cable channel that provides video description to create a SAP channel. DBS providers, in contrast, can serve the entire country with video description through its satellite service, spreading its equipment costs over a much wider base of customers. If cable operators are subject to any rules, then an exemption for DBS providers would be unjustified.

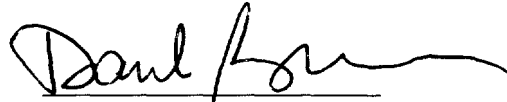
⁵³ *Id.* at 10 (proposing that smaller MVPDs be defined as “those serving fewer than 500,000 subscribers in the aggregate nationwide”); Comments of NTVAC at 8.

⁵⁴ DirecTV Comments at 5.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our initial Comments in the proceeding, NCTA respectfully urges the Commission to refrain from adopting any video description mandates.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel Brenner", written over a horizontal line.

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